IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1286

RUDOLPH EBERSTADT, JR. AND MICRODOT, INC.,
Petitioners,

vs.

ANN FLAMM AND ARNOLD FLAMM,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Rudolph Eberstadt, Jr. and Microdot, Inc., pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on October 23, 1978.

OPINIONS BELOW.

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 587 F. 2d 866 and are reproduced herein as Appendices A and B, respectively. The Memorandum of Decision of the District Court is unreported, but is printed in its entirety as Appendix C hereto.

JURISDICTION.

The Opinion and Judgment of the Court of Appeals was entered on October 23, 1978 (Appendix A). A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on December 5, 1978 (Appendix B). This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Article III "case or controversy" requirement can be satisfied where all claims of the named plaintiffs have been rendered moot and no class has been certified.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The provisions involved herein include the following: U. S. Constitution, Article III, Section 2; Rule 23, Fed. R. Civ. P.; Rules Enabling Act, 28 U. S. C. § 2072; and Rule 82, Fed. R. Civ. P., reproduced as Appendix D.

STATEMENT OF THE CASE.

This case presents a clear conflict between a Constitutionally mandated jurisdictional requirement and a rule of procedure. The Court of Appeals for the Seventh Circuit has held in this case that Rule 23 of the Federal Rules of Civil Procedure must take precedence over the Article III "case or controversy" jurisdictional requirement.

The Complaint in this case, initially filed on February 6, 1976,[1] seeks to recover for certain alleged misstatements and

1. An Amended Complaint was filed on February 13, 1976, and on March 5, 1976 an Amendment to the Amended Complaint was filed.

omissions of material fact made in connection with the sale of Microdot common stock during the period beginning on December 5, 1975 and ending on January 23, 1976, in violation of the Securities Exchange Act of 1934, §§ 10(b), and 14(e), 15 U. S. C. §§ 78j(b), and n(e). In their Complaint, Plaintiffs-Respondents ("Plaintiffs") seek damages for themselves as well as the right to represent a class composed of:

> "All sellers of the common stock of Microdot, Inc. during the period beginning on December 5, 1976 and ending at the close of business on January 23, 1976, excluding the defendants and those in concert with them."

Plaintiffs' initial motion for class certification, filed on March 30, 1976, was denied by the District Court on October 19, 1976. In the view of the District Court, the existence of a professional relationship between one of the named Plaintiffs and counsel for the purported class presented a sufficient potential conflict of interest so as to justify denial of class certification. The decision of the District Court was affirmed by the Seventh Circuit in *Susman* v. *Lincoln American Corp.*, 561 F. 2d 86 (7th Cir. 1977).[2]

On remand, Plaintiffs requested, and were granted, leave to substitute new counsel. Plaintiffs thereafter filed another motion for class certification with the District Court. Subsequently, during the briefing on this renewed motion, Defendants-Petitioners ("Defendants") offered to unconditionally tender to Plaintiffs their total damages claimed plus all properly chargeable costs. The offer was made without prejudice, solely to avoid the legal expenses that would be incurred in defense of the action.[3] Thereafter Defendants moved to dismiss the case on the grounds of mootness.

On December 29, 1977, the District Court issued its ruling dismissing the cause of action as moot. In an extensive and

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2. The decision in *Flamm* was consolidated on appeal with the case of *Susman* v. *Lincoln American Corp.*

3. Plaintiffs' Counsel, by letter dated November 3, 1977, rejected the Defendants' unconditional offer without explanation.

well reasoned opinion, the District Court, following the decision of the Seventh Circuit in *Winokur* v. *Bell Federal Savings & Loan Assoc.*, 560 F. 2d 271 (7th Cir. 1977), *reh. denied*, 562 F. 2d 1034 (7th Cir. 1977), *cert. den.*, ... U. S. ....., 98 S. Ct. 1507 (1978)[4] concluded that:

> "It is clear to this court that the facts of this case, although different in minor respects, fall squarely within the ambit of the *Winokur* holding. Thus, as in *Winokur*, plaintiffs herein have had their motion for class certification denied and in fact this denial was affirmed. Defendants have tendered the named plaintiffs the amount of their individual claims and there is presently no case or controversy between them. The fact that there is presently pending a motion for class certification does not make this case different from *Winokur* since this is exactly the same as having an appeal before the court of appeals seeking a review of a class action motion denial."[5]

On appeal, the Seventh Circuit reversed and remanded the case for further consideration of the class certification question.[6] Expressly acknowledging a conflict between its opinion and the decision of the Eighth Circuit in *Bradley* v. *Housing Authority of Kansas City*, 512 F. 2d 626 (8th Cir. 1975), the court stated:

> "We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court so that the

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4. In *Winokur* (*supra*), the Seventh Circuit held that

> "Our reading of recent decisions of the Supreme Court, however, leads to the conclusion that since plaintiffs' individual claims are now moot, and plaintiffs have not been authorized to represent other class members, the action lacks a live controversy. There being no live controversy, the appellate court cannot exercise jurisdiction, even to reverse the class action determination and thus instill a live controversy into the action." (560 F. 2d at 276).

5. Appendix C, at A9-10.

6. The instant case was consolidated on appeal with the case of *Susman* v. *Lincoln American Corp.*, 587 F. 2d 866 (7th Cir. 1978), pet. for cert. filed, 1/26/79, Docket No. 78-1169. The opinion in *Susman* included a discussion of certain derivative claims which are unrelated to this case.

> apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plaintiff whole."[7]

The court therefore concluded that an Article III "case or controversy" existed. Defendants' petition for rehearing with a suggestion for rehearing *en banc* was denied on December 5, 1978.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

I. The Decision of the Seventh Circuit Conflicts with Recent Decisions of This Court Which Hold That an Uncertified Class Lacks the Separate Jurisprudential Existence Necessary to State a Valid "Case or Controversy".

In reviewing the District Court's order dismissing this action, the Seventh Circuit focused its analysis upon the interests and needs of the yet uncertified class members. The court specifically noted:

> "Courts have consistently recognized that unnamed class members have an interest in a lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf. Thus, potential class members are given the opportunity to support or oppose class certification or to challenge the adequacy of representation by the named plaintiff. . . . The statute of limitations on their individual causes of action may be tolled from the date of filing of the class action complaint. . . . They may also have a right to be informed of, or even included in, a settlement that occurs prior to class certification. . . . Thus, at least in a limited sense, the interests of the unnamed class members are before the court during the pendency of a motion for class certification.[8]

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7. Appendix A at A4-5. The panel specifically noted that while its opinion did not go so far as to state that the mere filing of a complaint with class action allegations satisfies the Article III "case or controversy" requirement, the opinion does represent a precursor of that position. Appendix A at A5, n. 2.

8. Appendix A at A5. Citations omitted.

The opinion then concluded that even though the named plaintiffs' claims had been mooted by Defendants' tender, the interests of the unnamed persons continued to present the court with an Article III "case or controversy". Clearly, in order to reach that conclusion, the court necessarily imputed some limited jurisprudential existence to the still uncertified class of plaintiffs.[9] Petitioners respectfully submit that the Seventh Circuit's conclusion not only ignores the numerous decisions of this Court which interpret the Article III standard, but also contradicts those opinions which limit the separate jurisprudential life of class plaintiffs to the period of time *after* entry of a certification order.

The seminal case with respect to application of the mootness doctrine in a class action complaint is the decision of this Court in *Sosna* v. *Iowa,* 419 U. S. 393, 95 S. Ct. 553 (1975). In concluding that a properly certified class action continued to present a valid "case or controversy" in spite of the fact that the claim of the named plaintiff had become moot, this Court stated:

> "When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. *We are of the view that this factor significantly affects the mootness determination.*" (419 U. S. at 399). (Emphasis added).

The Court was careful to note, however, that its decision did not exempt class actions from the "case or controversy" standard. To the contrary, the Court emphasized that:

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9. The Seventh Circuit's opinion also evidences an obvious concern for the continued vitality of the class action vehicle if Petitioners' tender was permitted to moot the instant controversy. In order to avoid that result, the court created a new and wholly unprecedented exception to the Article III "case or controversy" requirement which expanded their jurisdiction to encompass an otherwise moot controversy. It is respectfully submitted however, that any effort to expand court jurisdiction in order to accommodate Rule 23 is expressly prohibited by both the Rules Enabling Act, 28 U. S. C. § 2072, and Rule 82, Fed. R. Civ. P. See *Snyder* v. *Harris,* 394 U. S. 332, 89 S. Ct. 1053 (1969).

> "Our conclusion that this case is not moot in no way detracts from the firmly established requirement that the judicial power of Art. III courts extends only to 'cases and controversies' specified in that Article. *There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23, but there must be a live controversy at the time this Court reviews the case. . . .*" (419 U. S. at 402). (Emphasis added).[10]

The strict manner in which the *Sosna* ruling must be applied was demonstrated by this Court in *Board of School Commissioners* v. *Jacobs*, 420 U. S. 128, 95 S. Ct. 848 (1975). In *Jacobs*, although the action had been filed and treated as a class action case, a formal certification order had never been entered by the district court. By the time the case reached the Supreme Court, the claims of all named plaintiffs had become moot. In dismissing the cause of action, the Court specifically stated:

> "*Because the class action was never properly certified nor the class properly identified by the District Court*, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint." (420 U. S. at 130). (Emphasis added).

The obvious focus of the *Jacobs* decision was upon the absence of a class certification order. As stated in both *Sosna* and *Jacobs*, it is that factor alone which imbues the unnamed class members with a jurisprudential existence separate from that of the named plaintiff. The unmistakable conclusion which must be drawn from those cases is that in the absence of a formal certification order, the unnamed class members do not, by themselves, present a sufficient "case or controversy" to

10. The opinion of the Seventh Circuit raises the clear implication that in the view of that Court, the mere act of filing a class action complaint raises a sufficient controversy to satisfy the Article III requirement until such time as a class certification motion is decided. See Appendix A at A5, n. 2. That theory directly contravenes the language and principle of the *Sosna* decision.

satisfy the Article III standard. As noted, the Seventh Circuit's opinion herein imputes a jurisprudential existence to unnamed class members prior to certification. That conclusion is in direct conflict with the opinions of this Court in both *Sosna* and *Jacobs*.

The import of both *Sosna* and *Jacobs* was reaffirmed by this Court in *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424, 96 S. Ct. 2697 (1976). Once again, this Court emphasized the act of class certification as the point at which the interests of unnamed class members assume a life apart from that of the named representative:

> Counsel for the individual named respondents, the original student plaintiffs and their parents, argue that this litigation was filed as a class action, that all the parties have until now treated it as a class action, and that the failure to obtain the class certification required under Rule 23 is merely the absence of a meaningless 'verbal recital' which counsel insists should have no effect on the facts of this case. But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. *And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena public schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation.* Except for the intervention of the United States, we think this case would clearly be moot. *Sosna* v. *Iowa*, 419 U. S. 393, 95 S. Ct. 553, 42 L. Ed. 2d 432 (1975), *Indianapolis School Comm'rs* v. *Jacobs*, 420 U. S. 128, 95 S. Ct. 848, 43 L. Ed. 2d 74 (1975)." (427 U. S. at 430). (Emphasis added).

It is respectfully submitted that Article III of the Constitution, as applied by this Court, requires the dismissal of any class action complaint in which the claim of the named plaintiff becomes moot prior to district court certification of a properly identified

class.[11] The decision of the Seventh Circuit not only disregards that prohibition, but seeks to alter it. The Circuit Court has emasculated the Constitutionally mandated "case or controversy" requirement by ruling that although the named plaintiffs have no further "stake" or "interest" in this litigation, the unidentified and uncertified class is entitled to Article III recognition. Such judicial indifference to the limitations of federal court jurisdiction is clearly inconsistent with the decisions of this Court.

II. The Decision of the Seventh Circuit Conflicts with Recent Decisions of Other Circuit Courts of Appeal.

In concluding that the District Court erroneously dismissed the instant action, the Seventh Circuit conceded that its decision was in direct conflict with the decision of the Eighth Circuit in *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F. 2d 626 (8th Cir. 1975).

In *Bradley,* four public housing applicants filed a class action complaint alleging that the Housing Authority of Kansas City followed certain illegal tenant selection policies. During the pendency of plaintiffs' motion for class certification, the De-

11. *See also Baxter* v. *Palmigiano,* 425 U. S. 308, 96 S. Ct. 1551 (1976); and *Kremens* v. *Bartley,* 431 U. S. 119, 97 S. Ct. 1709 (1977). This Court has recognized an exception to the certification requirement for the narrow class of cases in which the claims of the putative class are "capable of repetition yet evading review". *Gerstein* v. *Pugh,* 420 U. S. 103, 95 S. Ct. 854 (1975). As applied, the so-called "relation back" doctrine permits a court to assert jurisdiction over an uncertified class action complaint even though the claims of the named plaintiff have become moot. Application of the "relation back" doctrine has been limited, however, to those circumstances in which:

> "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. . . ."
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> *Weinstein* v. *Bradford,* 423 U. S. 147, 149, 96 S. Ct. 347 (1975).

The Seventh Circuit specifically noted that the instant case does not fall within the "relation back" doctrine. Appendix A at A6.

fendant Housing Authority voluntarily changed its selection policies and notified all named plaintiffs that they would immediately be placed in Housing Authority operated apartments. As recognized by the court, the Housing Authority's act of immediately placing all plaintiffs in public housing occurred solely in response to the lawsuit. In spite of the fact that the claims of all named plaintiffs were rendered moot by a voluntary act of the defendant while a motion for class certification was pending, the district court dismissed the action as moot. In affirming the decision of the district court, the Eighth Circuit specifically stated:

> "In light of the Supreme Court's recent decisions in *Board of School Comm'rs* v. *Jacobs,* 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975), and *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), we hold that the district court did not err in dismissing this action as moot. *Jacobs* and *Sosna* indicate that dismissal is required by the case or controversy provisions of Article III when the claims of all the named plaintiffs become moot before certification of the class under Fed.R.Civ.P. 23(c)(1)." (512 F.2d at 628).

Faced with virtually identical fact situations, the Eighth Circuit in *Bradley* and the Seventh Circuit in this case reached opposite conclusions. Petitioners further submit that the decision of the Seventh Circuit not only conflicts with the holding of the Eighth Circuit in *Bradley,* but also with decisions of other Circuits throughout the country. Moreover, a review of the manner in which many recent decisions have applied the mootness doctrine in a class action setting establishes that the views of the various Circuits are so skewed that Supreme Court review of this issue is imperative.

In *Vun Cannon* v. *Breed,* 565 F. 2d 1096 (9th Cir. 1977), the Ninth Circuit concluded that a Constitutional challenge to the California Penal Code did not present an Article III "controversy" after the claim of the putative named plaintiff was rendered moot:

> "And a formidable array of post-*Sosna-Jacobs* decisions —noted in the margin, together with quotations from their texts—makes manifest the conclusion that an improperly or non-certified class cannot succeed to the adversary position formerly occupied by a no-longer-aggrieved representative plaintiff whose own claim has become moot.
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> * * * * *
>
> "It is equally apparent that the rule is of constitutional rather than discretionary dimension: in the absence of a properly certified class, the representative plaintiff whose claim has become moot is himself without a litigable grievance, and the person or persons on whose behalf he seeks to continue the litigation has or have not yet achieved jurisprudential existence." (565 F.2d at 1098-1099). (Citations omitted).

The Second Circuit applied a similar analysis, also at odds with the reasoning of the Seventh Circuit, in the case of *Boyd* v. *Justices of Special Term,* 546 F. 2d 526 (2d Cir. 1976). The plaintiffs in *Boyd* filed a class action complaint which sought declaratory and injunctive relief to vindicate an alleged constitutional right to court appointed counsel in a state divorce proceeding. Prior to certification of the matter for class action treatment, the claims of all named plaintiffs were rendered moot. In affirming the district court order which dismissed the cause of action, the Second Circuit stated:

> "Since the plaintiffs now have the relief which they sought in their federal action, counsel for their matrimonial litigation in the state court, we have no jurisdiction. '[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' *North Carolina* v. *Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). No class action was certified below. Therefore appellants are not within any relaxation of the mootness doctrine provided by *Sosna* v. *Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)." (546 F.2d at 527).

The decision of the Fourth Circuit in *Banks* v. *Multifamily Management, Inc.*, 554 F. 2d 127 (4th Cir. 1977), presents yet another conflict with the Seventh Circuit's decision in this case. The plaintiff in *Banks* filed a class action complaint alleging that eviction procedures utilized by a federally funded housing project did not comport with minimal due process safeguards. As in the *Bradley* case, (*supra*), the defendant landlord voluntarily gave the putative named plaintiff all relief she sought prior to the time of class certification. In affirming the district court's order dismissing the action as moot, the Fourth Circuit stated:

> "The district court was well within its discretion in deferring its ruling on the request for a plaintiff class until the Secretary could respond and voice any opposition that she might wish to interpose. . . . That opposition was timely filed; but before the questions that it raised could be addressed and any class certified, the landlord's consent to a permanent injunction intervened, thereby rendering plaintiff an inappropriate representative for the class sought to be certified. . . ." (554 F. 2d at 128). (Citations omitted).

The recent decision in *Shipp* v. *Memphis Area Office, Tennessee Department of Employment Security*, 581 F. 2d 1167 (6th Cir. 1978), further typifies the conflict between the decision of the Seventh Circuit herein, and the view of the other Circuits. The plaintiff in *Shipp* filed a complaint containing both individual and class allegations of racial discrimination. After trial on the merits, plaintiff's individual claims were dismissed. Without entering a class certification order, the trial court proceeded to hear evidence on the plaintiffs class claims. Those claims were also dismissed on the merits.

On appeal, the court examined the propriety of the district court's decision to hear evidence on the merits of the class allegations. In concluding that the district court lacked jurisdiction to hear those claims, the court noted:

> "This is not a case where a class was appropriately certified and it later developed that the named plaintiff was an inappropriate class representative. In that case, the class claims would not be mooted or destroyed. Here, the district court failed to certify the class even after trial on the merits of the individual and class claims. As the Supreme Court said in *Board of Commissioners* v. *Jacobs, supra,* 420 U.S. at 130, 95 S.Ct. at 850:
>
> > "Because the class action was never properly certified nor the class properly identified by the District Court, the judgment of the Court of Appeals is vacated and the case is remanded to that court with instructions to order the District Court to vacate its judgment and to dismiss the complaint." (581 F. 2d at 1172).

Contrasting each of those decisions with the opinion of the Seventh Circuit in this case reveals the undeniable existence of a conflict. The Second, Fourth, Sixth, and Ninth Circuits have each applied the *Sosna-Jacobs* rationale as mandated by this Court; *i.e.*, in the absence of class certification, mooting the claims of the named plaintiff renders the entire cause of action moot. In contrast, the Seventh Circuit has not only ignored the opinion of this Court in *Jacobs,* but has extended the rationale in *Sosna* beyond all reasonable bounds; *i.e.*, the uncertified class does have a sufficiently separate jurisprudential existence to satisfy the Article III "case or controversy" standard.

Further, a significant conflict exists among those Circuits which purport to agree upon the appropriate test of mootness. The panel opinion in the case at bar premised its finding of an Article III "controversy" upon the interests of unnamed class members. The opinion stated:

> "We consider the motion for certification, while pending as sufficiently, though provisionally, *bringing the interest of class members before the court* so that the apparent conflict between their interests and those of the defendant

> will avoid a mootness artifically created by the defendant by making the named plaintiff whole."[12]

In contrast, the Fifth Circuit opinion in *Roper* v. *Consurve, Inc.*, 578 F. 2d 1106 (5th Cir. 1978), based its finding of an Article III "controversy" upon certain alleged fiduciary duties which the named plaintiff must assume. That opinion states:

> "By the very action of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims." (578 F. 2d at 1110).[13]

It is therefore clear that the issue of mootness in a class action setting has generated significant conflict among the Circuits. The Seventh Circuit opinion in this case is in direct conflict with decisions of the Second, Fourth, Sixth, Eighth, and Ninth Circuits. Moreover, the decision of the Fifth Circuit which appears to be consistent with the Seventh Circuit's decision is, in fact, wholly inconsistent in its reasoning. A Writ of Certiorari should therefore issue to resolve these fundamental conflicts among the Circuits.

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12. Appendix A at A4. It must be noted that the Seventh Circuit's conclusion that unnamed class members have a sufficient stake in the case to satisfy the "case or controversy" requirement is contrary to the Fifth Circuit's holding in *Satterwhite* v. *City of Greenville, Texas,* 578 F. 2d 987, 996 (5th Cir. 1978), wherein the court stated:

> "As no other champion has come forward and as the uncertified class lacks the stake in the controversy that a previously certified class might possess under *Franks* and *Sosna* the class action must be dismissed."

13. The reasoning of the Fifth Circuit in *Roper* is inconsistent with its own holdings in *Satterwhite, supra,* footnote 12 and *Powers* v. *Schwartz,* 587 F. 2d 783 (5th Cir. 1979), in which the Fifth Circuit, without even mentioning its decision in *Roper,* dismissed an uncertified class action as moot, based upon the authority in *Weinstein* v. *Bradford, (supra).*

III. Proper Application of Article III "Case or Controversy Requirement to Putative Class Action Claims Is an Important Federal Question Which Should Be Promptly and Definitively Resolved by This Court Since It Is a Threshold Jurisdictional Issue Which Will Arise in Other Cases.

The Seventh Circuit's decision in this case has improperly extended federal court jurisdiction beyond its Constitutional limitation. Under this decision, the Article III "case or controversy" limitation is no longer a mandatory limitation upon the jurisdiction of federal courts in the Seventh Circuit. The Seventh Circuit has ignored this Court's decisions in *Sosna* and *Jacobs* which require that a class must be certified before it is invested with jurisprudential existence. It is submitted that such an extension of federal court jurisdiction has no basis in either the Constitution or decisions of this Court.

Petitioners submit that the proper application of the Article III "case or controversy" requirement to a class action complaint is an important federal question which is now ripe for decision and which should be definitively resolved by this Court. The importance and timeliness of this issue is perhaps best demonstrated by the number of cases presently pending before this Court in which the issue of mootness has been raised in the context of a class action. *See, Geraghty* v. *United States Parole Commission,* 579 F. 2d 238 (3d Cir. 1978), pet. for cert. filed, October 5, 1978, No. 78-572; *Roper* v. *Consurve, Inc.,* 578 F. 2d 1106 (5th Cir. 1978), pet. for cert. filed, November 29, 1978, No. 78-904; *Satterwhite* v. *City of Greenville, Texas,* 578 F. 2d 987 (5th Cir. 1978), pet. for cert. filed, December 21, 1978, No. 78-1008; *Shipp* v. *Memphis Area Office, Tennessee Department of Employment Security,* 581 F. 2d 1167 (6th Cir. 1978), pet. for cert. filed, January 24, 1979, No. 78-1158; and *Susman* v. *Lincoln American Corp.,* 587 F. 2d 866 (7th Cir. 1978), pet. for cert. filed, January 26, 1979, No. 78-1169.

Since the issue raised herein will be a threshold question in future federal district court cases which will be complex, time-consuming and expensive, the interests of judicial economy and fairness to all parties mandate a prompt resolution of the issue by this Court.

CONCLUSION.

The interpretation of the Constitutional limitation upon federal court jurisdiction which the Seventh Circuit has adopted does not and indeed cannot be squared with the decisions of this Court in *Sosna, Jacobs,* and their progeny. Indeed, it is submitted that the Seventh Circuit's decision erodes the Constitutionally mandated "case of controversy" requirement to the point of reducing that standard to a mere convenience which courts may utilize or disregard at will. Furthermore, the issue presented raises a pure question of Constitutional interpretation which directly bears upon the threshold issue of federal court jurisdiction, upon which there is a recognized conflict among the Circuits.

For all of the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES OF APPEALS
For the Seventh Circuit

No. 78-1293
MICHAEL SUSMAN,
Plaintiff-Appellant,

vs.

LINCOLN AMERICAN CORP., ET AL.,
Defendants-Appellees.

No. 78-1310
ANN FLAMM and ARNOLD FLAMM,
Plaintiffs-Appellants.

vs.

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 73 C 1089 and 76 C 427—Joel M. Flaum, *Judge.*

ARGUED SEPTEMBER 14, 1978—DECIDED OCTOBER 23, 1978.

Before FAIRCHILD, *Chief Judge*, CUMMINGS and WOOD, *Circuit Judges.*

FAIRCHILD, *Chief Judge*. This is the consolidated appeal from the dismissals of two class action complaints. The district court,

relying on this court's decision in *Winokur* v. *Bell Federal Savings and Loan,* 560 F. 2d 271 (7th Cir. 1977), dismissed both actions as moot after the defendants tendered to the named plaintiffs their full monetary damages. We limit the *Winokur* language relied on by the district court and reverse its decision in both cases. We remand for determination of the motions for class certification that were pending at the time of the dismissal. In the *Susman* case, the district court also dismissed the plaintiff's derivative claims. We affirm that decision in part and reverse it in part.

In these cases, unlike *Winokur,* an appeal from the denial of class certification was effected under 28 U. S. C. § 1292(b). The facts of both cases were discussed in our decision in that appeal on the issue of whether plaintiffs' counsel could fairly and adequately represent the classes sought to be certified. *Susman* v. *Lincoln American Corp.,* 561 F. 2d 86 (7th Cir. 1977). The facts will not be repeated here. In the prior decision we affirmed the district court's denials of class certification on the grounds that the relationship between the named plaintiffs and their counsel could lead to a conflict of interest and noted

> "[P]laintiffs are free to seek different counsel and thereby dispel any possibility of a conflict of interest. In lieu of a change of counsel which might result in a certification of the class actions, plaintiffs are not barred from continuing their lawsuits on their own behalf."
>
> 561 F. 2d 96

Clearly we recognized potential further consideration of representation of the interests of class members by the named plaintiffs.

The plaintiffs in both cases sought and obtained new counsel. Renewed motions for class certification were then filed. While the renewed motions were pending the defendants tendered to the plaintiffs the amount of money they claimed to have lost

as a result of the defendants' actions plus properly chargeable costs. The offers, which were made without admissions of liability by the defendants, and which were clearly made in an attempt to render the cases moot, were refused by the plaintiffs. Nevertheless, the district court held that the defendants' offers extinguished the controversies between the parties and that as a result the court no longer had jurisdiction to decide the motions for class certification. In the *Susman* case, the district court also dismissed the plaintiff's derivative claims.

THE CLASS ACTION.

The Article III requirement that the federal courts decide only issues where there is an actual case or controversy between the parties is fundamental to our judicial system. *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). The jurisdictional ban on making any decisions in moot cases (or, for that matter, in reviewing decisions already made) arises from this constitutional requirement. *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964); *Powell* v. *McCormack*, 395 U. S. 486, 496 n. 7 (1969). Yet a number of cases have been decided on the merits despite assertions that the original wrong complained of had been corrected, that the original plaintiff would no longer be affected by the outcome of the lawsuit, or that other changes in the underlying factual situation rendered the case moot. *See, e.g., United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953) (corporate director resigned from interlocking directorates which were subject to the complaint); *Carroll* v. *President and Comm'rs of Princess Anne*, 393 U. S. 175 (1968) (ten day injunction complained of had expired two years previously); *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498 (1911) (ICC order under attack had expired by its own terms); *Sosna* v. *Iowa*, 419 U. S. 393 (1975) (plaintiff had obtained the divorce she was seeking in another state). It is not necessary in this decision to discuss the variety of exceptions to the mootness

doctrine that may be available in various cases.[1] What are important, here, however, as in *Winokur* are those cases which involve class action complaints.

In *Winokur* we were directly concerned with the question whether the right to appellate review of a denial of class certification could survive the death of the controversy. We held it could not. Our present case is different, and does not present that question. In *Winokur*, however, we set forth several generalizations, including

> 2. When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.
>
> 560 F. 2d 277

This generalization literally applies to our instant case because at the critical moment there had been no determination that the action be maintained as a class action. We think, however, that our instant case differs significantly from *Winokur* and from *Board of School Comm'rs* v. *Jacobs*, 420 U. S. 129 (1975), on which we relied in *Winokur*. Here, at the critical moment, the question of maintaining the class action had been freshly raised, consistently with the suggestion of the appellate court that it could be reopened after a change in counsel.

We consider the motion for certification, while pending, as sufficiently, though provisionally, bringing the interests of class members before the court so that the apparent conflict between their interests and those of the defendant will avoid a mootness artificially created by the defendant by making the named plain-

1. There is an extensive discussion of the current state of the mootness doctrine in *Geraghty* v. *U. S. Parole Commission*, 579 F. 2d 238 (3rd Cir. 1978).

tiff whole. We limit the language of generalization No. 2 in *Winokur* accordingly.[2]

Courts have consistently recognized the unnamed class members have an interest in a lawsuit even before a Rule 23 determination is made that a class action may be maintained on their behalf. Thus, potential class members are given the opportunity to support or oppose class certification or to challenge the adequacy of representation by the named plaintiff. *Knuth* v. *Erie-Crawford Dairy Coop. Ass'n,* 395 F. 2d 420 (3rd Cir. 1968). The statute of limitations on their individual causes of action may be tolled from the date of filing of the class action complaint. *American Pipe & Construction Co.* v. *Utah,* 416 U. S. 538 (1974). They may also have a right to be informed of, or even included in, a settlement that occurs prior to class certification. *Kahan* v. *Rosensteil,* 424 F. 2d 161, 169 (3rd Cir.), *cert. denied,* 398 U. S. 950 (1970). Thus, at least in a limited sense, the interests of the unnamed class members are before the court during the pendency of a motion for class certification.

Normally, however, a class action must be certified as such in order for it to escape dismissal once the claims of the named plaintiff become moot. *Franks* v. *Bowman Transportation,* 424 U. S. 747 (1976); *Sosna* v. *Iowa,* 419 U. S. 393, 402 (1975). But the courts have recognized that an absolute requirement would prevent some otherwise justiciable claims from ever being subject to judicial review. Thus, in *Sosna,* the Supreme Court said

> "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of

2. It would be arguable, on the same theory, that a complaint with class action allegations sufficiently brings the interests of the class members before the court, at least where the court proceeds with reasonable promptness to reach the issue of class action maintenance. We do not need to reach that question. See footnote 4 *infra.*

> the complaint may depend upon the circumstances of the particular case and the reality of the claim that otherwise the issue would evade review."
>
> 419 U. S. 393, 402 n. 11

Clearly the Court had in mind situations where the nature of the complaint was such that the mere passage of time would usually make the individual plaintiff's complaint moot before a court could reasonably be expected to rule on a certification motion. And in practice that is how the "relation back" doctrine has been applied. *Gerstein* v. *Pugh,* 420 U. S. 103 (1975). We do not have such a situation here. But, just as necessity required the development of the relation back doctrine in cases where the underlying factual situation naturally changes so rapidly that the courts cannot keep up, so necessity compels a similar result here. If the class action device is to work, the courts must have a reasonable opportunity to consider and decide a motion for certification. If a tender made to the individual plaintiff while the motion for certification is pending could prevent the courts from ever reaching the class action issues, that opportunity is at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.

We hold, therefore, that when a motion for class certification has been pursued with reasonable diligence and is then pending before the district court, a case does not become moot merely because of the tender to the named plaintiffs of their individual money damages. The district court has jurisdiction to consider the motion for class certification and should hear and decide that motion prior to deciding whether or not the case is mooted by the tender. This does not mean that the district court should ignore the fact that a tender has been made. The tender may raise a question, on which we now express no opinion, as to the named plaintiffs' ability to fairly and adequately represent the class.[3] But the class certification issues should be addressed

3. See *Kuahula* v. *Employers Insurance of Wausau,* 557 F. 2d 1334 (9th Cir. 1977); *Roper* v. *Conserve,* 578 F. 2d 1106 (5th Cir.

(Footnote continued on next page.)

by the district court prior to dismissals of the lawsuits. We express no opinion on the appropriate decision on the issues.

We acknowledge the conflict between this decision and that of the Eighth Circuit in *Bradley* v. *Housing Authority of Kansas City, Missouri,* 512 F. 2d 626 (8th Cir. 1975). We believe, however, that the result we have reached here is consistent with Article III, since in fact there will be no adjudication of the merits of the lawsuit unless there is first a determination that there are adversary parties and that the requirements of justiciability are present. *Geraghty* v. *U. S. Parole Commission,* 579 F. 2d 238 (3rd Cir. 1978). Our decision in these cases is also consistent with the recent decision of the Court of Appeals for the Fifth Circuit in *Roper* v. *Conserve, Inc.,* 578 F. 2d 1106 (5th Cir. 1978), which contained this language

> The notion that a defendant may short-circuit a class action by paying off the class representatives either with their acquiescence or, as here, against their will, deserves short shrift. Indeed, were it so easy to end class actions, few would survive. . . . By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease-fire may not be pressed upon them by paying their claims.
>
> 578 F. 2d 1106, 1110[4]

Finally, although the recent decisions of the Ninth Circuit in *Kuahula* v. *Employers Insurance of Wausau,* 557 F. 2d 1334 (1977) and the Third Circuit in *Geraghty* v. *U. S. Parole Com-*

(Footnote continued from preceding page.)
1978); *Banks* v. *Multi-Family Management, Inc.,* 554 F. 2d 127 (4th Cir. 1977); and generally, H. Newberg, NEWBERG ON CLASS ACTIONS §§ 1085-1092.

4. The Fifth Circuit has held that the very filing of a class action complaint places the plaintiff in a representative capacity, even if no motion for certification has been filed or even if class certification has been denied. (See cases cited in *Roper.*) Our decision today is limited to the fairly narrow situation where a motion for certification has been pursued with reasonable diligence and is pending when a tender is made.

mission, 579 F. 2d 238 (1978) both involved factually distinct situations, their emphasis, like that in *Sosna,* on evaluating claims of mootness in light of the idiosyncrasies of each individual case is consistent with the approach we have used here.

THE DERIVATIVE CLAIMS.

The district court dismissed the plaintiff Susman's derivative claims against Lincoln American and the individual defendants on the grounds that

> "Since plaintiff does not seek recession [sic] of the alleged illegal merger, once the merger took place plaintiffs lost the ability to sue derivatively. *See Voege* v. *Ackerman,* 364 F.Supp. 72, 74 (S.D. N.Y. 1973); *Basch* v. *Talley Indus., Inc.,* 53 F.R.D.9, 11-12 (S.D. N.Y. 1971); *Heit* v. *Tenneco, Inc.,* 319 F.Supp. 884, 887-88 (D. Del. 1970).
>
> No. 73 C 1089 (N.D. Ill., Filed January 27, 1978)

The plaintiff contends that this ruling is in error since it involved the application of state rather than federal law and that even if state law is controlling, it was misapplied on the facts of the plaintiff's case. All of the parties have referred to Delaware law as the law to be applied to the extent that state law is controlling.

We do not need to address the plaintiff's assertion that federal rather than state law should apply in determining the capacity of a shareholder to bring a suit under the federal securities laws on behalf of a corporation that has been merged with a defendant corporation subsequent to the filing of the complaint since it is clear that the derivative claims asserted by the plaintiff are founded solely on state law.[5] Nor do federal equitable con-

5. Paragraph 10 of the plaintiff's amended complaint sets forth specific allegations of improper activity by the defendants. Paragraph 11 recites that "The foregoing acts of defendants constitute deceptive devices, a scheme to defraud and misstatements and omissions to state material facts in connection with the purchase and sale of securities and in connection with the solicitation of proxies *to*

(Footnote continued on next page.)

siderations come into play, since the plaintiff did not attempt to enjoin the merger and is not now seeking rescission—in contrast to the situation we were presented with in *Ramsburg* v. *American Investment Co. of Ill.*, 231 F. 2d 333 (7th Cir. 1956). The only question, then, is whether under Delaware law the plaintiff may maintain this derivative suit.

Delaware law is quite clear in stating that a derivative suit seeking only money damages brought on behalf of one corporation and against another cannot survive the merger of those two corporations regardless of whether the suit was filed before or after the merger took place. *Bokat* v. *Getty Oil Co.*, 262 A. 2d 246 (Del. Sup. Ct. 1970). The dismissal of the derivative suit against Lincoln American, the surviving corporation, must therefore be affirmed.

Slightly more difficult is the question of whether the derivative suit can be maintained against third parties, even if it must be dismissed as against the surviving corporation. The Lincoln American defendants urge us to adopt the "common sense" approach of *Vine* v. *Beneficial Finance Co.*, 374 F. 2d 627 (2nd Cir. 1967) which noted the meaninglessness of a derivative action brought on behalf of a non-existent corporation. But in *Bokat* the Delaware Supreme Court, after dismissing the derivative claim against the surviving corporation, explicitly said

> "This conclusion, however, does not mean that the claims asserted against the individual defendants, among them J. Paul Getty, have likewise been made moot. Such is not the case." A. 2d at 250.

(Footnote continued from preceding page.)
the detriment of minority shareholders and are violative of § 78y(6), and the rules promulgated by the Securities Exchange Commission thereunder, including Rule 10B-5" (Emphasis added). Paragraph 12, in contrast, says "The foregoing also constitute a breach *of common law to the detriment of Consumers* and its minority shareholders in that: . . . ." (Emphasis added). The contrast between these two paragraphs clearly indicates that the federal claims are brought only on behalf of the minority shareholders (whom plaintiff seeks to represent in a class action), while the common law claims are brought both on behalf of the minority shareholders, and, derivatively on behalf of Consumers National.

Although this statement in *Bokat* was dictum (the individual claims were barred by the statute of limitations) it was made by the Delaware Supreme Court in a case subsequent to, and indeed citing the *Vine* case relied on by Lincoln American. It must, therefore, carry more weight in this case where we must apply Delaware law.

The cited language in *Bokat* has been analyzed at some length in a decision of the United States District Court for the Southern District of New York. *Abrams* v. *Occidental Petroleum Corp.*, 20 Fed. Rules Serv. 2d 170 (S. D. N. Y. 1975) (interpreting California and Delaware law). Judge Palmieri concluded that the *Bokat* language was an attempt to reconcile the savings clause of 8 Del. Code § 261 with the anomalous situation of a corporation suing itself. Therefore, he reasoned, a derivative suit begun by a shareholder against third parties prior to a merger could be continued after the merger (because of § 261) but that a similar suit brought against what was to become the surviving corporation must be dismissed after the merger to prevent the incongruous situation of a corporation suing itself. 20 Fed. Rules Serv. 2d at 175.

We cannot disregard the clear language of the Delaware Supreme Court. We hold, therefore, that while the dismissal of the derivative claims against Lincoln American must be affirmed, the dismissal of those same claims against the individual defendants must be reversed.

Insofar as the judgments appealed from dismissed the actions as moot without considering the questions of certification, and insofar as the judgment in No. 78-1293 dismissed the derivative action against parties other than Lincoln American, they are reversed and the causes remanded for further proceedings consistent with this opinion. In all other respects they are affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1978

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

MICHAEL SUSMAN,
Plaintiff-Appellant,

No. 78-1293 *vs.*

LINCOLN AMERICAN CORP., et al.,
Defendants-Appellees,

and

ANN FLAMM and ARNOLD FLAMM,
Plaintiffs-Appellants,

No. 78-1310 *vs.*

RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 73 C 1089 and 76 C 427

Joel M. Flaum,
Judge.

ORDER.

On consideration of the petitions for rehearing and suggestions for rehearing *in banc* filed in the above-entitled causes by

defendants-appellees, no judge* in regular active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

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* Circuit Judge Philip W. Tone disqualified himself from any consideration of the petitions for rehearing and suggestions for rehearing *in banc*.

APPENDIX C.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ANN FLAMM and ARNOLD M. FLAMM,
Plaintiffs,
vs.
RUDOLPH EBERSTADT, JR. and MICRODOT, INC.,
Defendants.

76 C 427

MEMORANDUM OPINION.

JOEL M. FLAUM, *District Judge:*

This case was filed as a class action asserting claims under the Securities Exchange Act of 1934, §§ 10(b), 14(e), 15 U. S. C. §§ 78j(b), n(e). In an opinion dated October 19, 1976, this court issued a ruling denying plaintiffs' motion for class certification because of plaintiffs' failure to meet the requirements of Fed. R. Civ. P. 23(a)(4). *Flamm* v. *Eberstadt,* 72 F. R. D. 187 (N. D. Ill. 1976). Thereupon, this court, pursuant to 28 U. S. C. § 1292(b), certified the issue of whether plaintiffs' were adequate representatives of the class they sought to represent to the court of appeals, and on January 25, 1977 that court granted plaintiffs' permission to appeal. In an opinion dated August 31, 1977, the Seventh Circuit affirmed this court's ruling denying plaintiffs' motion for class certification. *Susman* v. *Lincoln American Corp.,* No. 77-1145 (7th Cir. August 31, 1977).[1]

1. This court had certified the *Flamm* case and the *Susman* case for purposes of an interlocutory appeal since they both involved the same class action issue.

Plaintiffs' have again moved for class certification stating that the reason this court found them to be inadequate class representatives no longer exists and class certification is appropriate at this time. However, before the briefing on this question was completed and this court could rule on plaintiffs' motion, defendants, in a letter dated November 1, 1977, tendered[2] to plaintiffs the amount of money they claimed they had been individually deprived of by defendants' actions as alleged in the instant complaint. Defendants have now moved to dismiss plaintiffs' complaint on the ground of mootness arguing that there does not exist at this time a justicable, Article III of the Constitution "case or controversy" between plaintiffs and defendants. Thus, defendants argue that since plaintiffs have obtained all the relief they seek to obtain from this lawsuit it would be a waste of judicial energy, as well as a violation of the constitutional prohibition against courts rendering advisory opinions, to allow this case to continue. For this proposition defendants primarily rely on the recent decision in *Winokur* v. *Bell Federal Sav. & Loan Ass'n.*, 560 F. 2d 271 (7th Cir. 1977). After reviewing the briefs submitted by the parties, this court is compelled to grant defendants' motion because of the Seventh Circuit's ruling in *Winokur,* and accordingly, this cause is dismissed.

In opposition to defendants' motion, plaintiffs present two arguments. First, plaintiffs rely on a line of cases starting with *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), which hold that the "mere voluntary cessation of allegedly illegal conduct does not moot a case." *Burbank* v. *Twomey*, 520 F. 2d 744, 747 (7th Cir. 1975). Plaintiffs argue from this proposition that defendants, by tendering to plaintiffs the amount of their individual claims, cannot moot this action by their own

2. Although the plaintiffs challenge the adequacy of defendants' tender for several reasons, this court finds the letter to plaintiffs to constitute a valid tender to end the controversy between the named plaintiffs and defendants. *See, e.g., Guthrie* v. *Curnutt,* 417 F. 2d 764 (10th Cir. 1969); *Martindell* v. *Lake Shore Nat'l Bank,* 15 Ill. App. 2d 217, 145 N. E. 2d 784 (1957), *rev'd on other grounds,* 15 Ill. 2d 272, 154 N. E. 2d 683 (1958).

voluntary acts. This analysis, however, is incorrect. As was recognized in *Winokur,* the doctrine as enunciated in *W. T. Grant* only applies if there is the possibility that the defendant will continue in the future to infringe upon plaintiff's rights. *Winokur* v. *Bell Federal Sav. & Loan Ass'n,* 560 F. 2d 271, 274 (7th Cir. 1977). Since plaintiffs do not seek injunctive relief in this cause, and since plaintiffs have not indicated that they fear that defendants will again injure them by way of further violations of the federal securities laws, plaintiffs' first argument based upon *W. T. Grant* and its progeny is without merit.

Plaintiffs' second argument, although more substantial in this court's view is likewise without merit in light of *Winokur.* Plaintiffs argue that because they presently have pending a motion for class certification the mere fact that their individual claims may be moot does not render this action, as a class action, moot. Thus, plaintiffs rely on the limited exception to the mootness doctrine as applied to class actions delineated in *Gerstein* v. *Pugh,* 420 U. S. 103, 110-11 n. 11 (1975), and as applied by this and other courts. *See, e.g., Langson* v. *Simon,* 74 F. R. D. 456 (N. D. Ill. 1977) (Flaum, J.); *Custom* v. *Trainor,* 74 F. R. D. 413 (N. D. Ill. 1977) (Marshall, J.); *Robinson* v. *Leahy,* 73 F. R. D. 109 (N. D. Ill. 1977) (Flaum, J.).

In *Gerstein,* the Supreme Court was faced with an action by individuals who were in police custody for pretrial detention. The plaintiffs, seeking to represent a class of all persons subject to such pretrial detention who were not afforded preliminary hearings as to the charges levied against them, challenged their confinement as violative of due process of law. The Supreme Court, in reviewing the record before it, noted that the named plaintiffs had been convicted of the charges against them and were no longer in pretrial custody. Moreover, the court noted that the record was not clear as to whether at the time the trial court granted plaintiffs' motion for class certification the named plaintiffs were still in pretrial detention and had a viable case or

controversy with the defendants. *Gerstein* v. *Pugh,* 420 U. S. 110-11 n. 11.

In considering whether the action was moot because the named plaintiffs' claims had been resolved, the Supreme Court stated that even if there had not been a live controversy between the named plaintiffs and defendants at the time the class certification motion was granted, the plantiffs' action could continue to vindicate the rights of those the named plaintiffs sought to represent. Thus, the court stated that although as a general rule a named plaintiff must be a member of the class he seeks to represent at the time the class is certified, and must at that time have a live controversy with the defendant, in order for a class action to continue in light of the subsequent mootness of the named plaintiff's claim, *see Sosna* v. *Iowa,* 419 U. S. 393 (1975), an exception to this rule existed when: (1) the nature of the plaintiff's and the class' claims were such that the plaintiff would have suffered his injury before the court could rule on his motion for class certification; (2) it was certain that a constant class of persons suffering the deprivation existed; and (3) the attorney representing the named representative has other clients with a continuing live interest in the case, *i.e.,* a public defender. *Gerstein* v. *Pugh,* 420 U. S. at 111 n. 11.

In the case at bar, plaintiffs argue that this action falls within the ambit of the *Gerstein* exception to the mootness doctrine and this court should rule that although the named plaintiffs' claims are moot this case should continue so as to vindicate the rights of the class the named plaintiffs seek to represent. Thus, plaintiffs argue that the unilateral action of defendants in tendering to the named plaintiffs the amount of their individual claims cannot be held to moot the class allegations because defendants will thereupon be able to prevent a class from ever having its claims vindicated.

While this court recognizes the rule as delineated in *Gerstein,* and as noted previously has applied that rule under different circumstances, this court is bound by the holding of the Seventh

Circuit in *Winokur*. In *Winokur*, plaintiffs' filed a federal securities class action in which they sought injunctive and monetary relief. Plaintiffs sought to have a class certified but the district court found that plaintiffs had not established the propriety of maintaining their action on a class-wide basis. Plaintiffs' request to have the issue certified to the court of appeals pursuant to 28 U. S. C. § 1292(b) was denied and plaintiffs were barred from appealing the denial of class status since such orders are not appealable in this circuit. *See Thill Securities Corp.* v. *New York Stock Exchange*, 469 F. 2d 14 (7th Cir. 1972). Thereafter, defendant tendered to the named plaintiffs the amount of their individual claim and changed its policies to avoid creating the same difficulties from arising again. This court[3] thereupon dismissed the action as moot stating that no case or controversy existed between the named plaintiffs and defendant in light of the fact that class certification had been denied.

The court of appeals affirmed the order of dismissal. *Winokur* v. *Bell Federal Savings & Loan Ass'n*, 560 F. 2d 271 (7th Cir. 1977). However, more importantly for the issues before the court in the case at bar, the court of appeals also held that it lacked jurisdiction to consider whether the district court had erred in denying class certification. Thus, plaintiffs' in *Winokur* argued that had the district court certified the class they sought to represent their action would not be moot even in light of defendant's tender. The court of appeals, plaintiffs argued, was therefore required to consider plaintiffs' request for class certifiction since plaintiffs' were not allowed to appeal the denial of their class motion previously. The Seventh Circuit rejected this argument stating the rule of law applicable to the case at bar as:

> When there is no determination that an action be maintained as a class action and the controversy between the named party in his own interest and his opponent dies, court adjudication is not appropriate because there is no controversy between parties who are present or represented before the court in the action.

3. This court was transferred the *Winokur* case after the denial of class certification.

It is clear to this court that the facts of this case, although different in minor respects, falls squarely within the ambit of the *Winokur* holding. Thus, as in *Winokur,* plaintiffs herein have had their motion for class certification denied and in fact this denial was affirmed. Defendants have tendered the named plaintiffs the amount of their individual claims and there is presently no case or controversy between them. The fact that their is presently pending a motion for class certification does not make this case different from *Winokur* since this is exactly the same as having an appeal before the court of appeals seeking a review of a class action motion denial.

Plaintiffs argue, however, that this court should not apply the *Winokur* case to their class action claims for several reasons. First, plaintiffs argue *Winokur* involved appellate review and the case at bar is still in the district court. While this is a difference, as stated above, it is not material. When an action becomes moot it ousts the court in which it is pending of jurisdiction to consider any other matters in that case. If the court of appeals felt itself barred by Article III to consider the propriety of class certification in *Winokur,* this court is no less barred from considering plaintiffs' renewed motion for class certification.

Second, plaintiffs argue that this court should treat its renewed motion for class certification as a motion to "reconsider" the prior denial of class certification. This, plaintiffs argue, would allow this court to make the granting of the class motion now "relate back" to the previous denial and would prevent any mooting of plaintiffs' class claims. However, this argument is simply a restatement of the plaintiffs' first argument and for the same reasons as previously mentioned must be rejected.

Finally, plaintiffs argue that, *Winokur* is wrongly decided. Thus, plaintiffs argue that the rule stated in *Winokur* and previously quoted in this opinion is directly in conflict with the holding in *Gerstein* that class actions can be certified in certain cases where the named plaintiffs' claims are mooted prior to

certification. However, whatever the merits of this argument, plaintiffs position must fail in this district court which is bound by the pronouncements of its court of appeals. This court recognizes that other courts, unlike the Seventh Circuit, have reviewed denials of class certification after plaintiff's claims have been mooted, *see, e.g., Cameron* v. *E. M. Adams & Co.*, 547 F. 2d 473 (9th Cir. 1976); *but see Napier* v. *Gertrude*, 542 F. 2d 825 (10th Cir. 1976), *cert. denied*, 97 S. Ct. 759 (1977). Moreover, this court notes that the Seventh Circuit did not cite *Gerstein* in its opinion in *Winokur* although it did cite cases decided after that decision.[4] Nevertheless, this court cannot say that the court of appeals did not consider *Gerstein* and find its principles inapplicable to the case at bar. It is possible that the court of appeals was of the opinion that the *Gerstein* exception did not apply in class actions to be certified under Fed. R. Civ. P. 23(b)(3) since it is not likely that defendants would repeat their illegal activity. Or perhaps the court decided that private class action attorneys did not meet the *Gerstein* requirement of class action counsel who had clients like the named plaintiffs interested in the vindication of the class' rights. Hence, whatever the court of appeals' reasons, *Winokur* is decided and its mandate must be obeyed.

Accordingly, this court must declare plaintiffs' action moot. The issues raised by plaintiffs concerning the problems of maintaining a class action when the defendants have the ability to moot the case must be resolved by the court of appeals in light of *Winokur*. On its facts this action is identical to *Winokur* and it must be dismissed.

It is so ordered.

/s/ JOEL M. FLAUM,
United States District Judge

Dated: December 30, 1977.

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4. In fact, the court in *Winokur* cited *Board of School Comm'rs* v. *Jacobs*, 420 U. S. 128 (1975), the decision in volume 420 of the United States Supreme Court Reports which immediately follows *Gerstein*.

APPENDIX D.

I. Constitution—Article III, Section 2, cl. 1:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

II. Rules Enabling Act—28 U. S. C. § 2072:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trail by jury as at common law and as declared by the Seventh Amendment to the Constitution.
>
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

III. Rule 82—Federal Rules of Civil Procedure:

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

IV. Rule 23—Federal Rules of Civil Procedure:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impraticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting-only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under sub-

division (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provision of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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